

Affirmation of the Open Fields Doctrine: The *Oliver* Twist

I. INTRODUCTION

There is little controversy over the concept of law enforcement by rules. When rules can be written clearly, specifically, and narrowly to effectuate legitimate goals (without disturbing protected rights), when they function to “catch” the guilty (but never the innocent), and when they make law enforcement simpler (but not arbitrary or unjust in the unusual case), they are applauded not only as efficiency measures, but as valuable forms of protection for individuals from abuse of discretionary power.

Problems arise, however, because not every area of the law lends itself neatly to clear definitions and per se exclusions. When a “bright line” rule, applied to a fact pattern unlike those anticipated in the rule’s creation, fails to promote the purpose of the rule, injustice results. If unjust results occur only infrequently, and with only slight loss or inconvenience to the parties involved, one might feel that in light of its usefulness in law enforcement, the rule is, on balance, justified. When, however, the burden of the injustice is great, and unjust results are more frequently produced, a more difficult problem arises: whether to discard the rule and resort to case-by-case consideration of facts in order to protect individuals, or to retain the rule at the cost of significant injustice in more than just the rare case.

In recent years, the United States Supreme Court has favored the use of bright line rules in fourth amendment analysis, even when it has recognized that injustice may sometimes result.¹ This attitude appears to reflect the Court’s new, narrower approach to the fourth amendment in general.² Unfortunately, not every area for which the Court has approved the use of bright line rules is amenable to their application.

One such area of fourth amendment application is the “open fields” exception³

1. It is important to note that bright line rules are, in concept, party-neutral. Sometimes individuals’ rights can be better protected by bright line rules: vaguely phrased rules can be administered by police and courts to the prosecution’s advantage. The familiar advice of rights and waiver rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), is an example of a protective bright line rule. Thus, the best solution to the problems created by the *Oliver* decision, discussed in this Comment, is not necessarily outright rejection of the bright line approach, but rather the substitution of a different, more appropriate, and more workable bright line rule than that established in *Oliver*. See *infra* notes 215–27 and accompanying text.

2. See, e.g., *New Jersey v. T.L.O.*, 105 S. Ct. 733 (1985) (no requirement of warrant or probable cause for searches of students by school officials); *INS v. Lopez-Mendoza*, 104 S. Ct. 3479 (1984) (exclusionary rule inapplicable to civil deportation proceedings); *United States v. Leon*, 104 S. Ct. 3405 (1984) (approving “good faith” exception to exclusionary rule); *United States v. Karo*, 104 S. Ct. 3296 (1984) (no fourth amendment violation in warrantless installation of “beeper” in ether can, used to trace movements of respondent); *Hudson v. Palmer*, 104 S. Ct. 3194 (1984) (fourth amendment protection against unreasonable searches does not apply to prison cells because prisoners have no reasonable expectation of privacy in their cells); *Nix v. Williams*, 104 S. Ct. 2501 (1984) (affirming “inevitable discovery” exception to the exclusionary rule); *United States v. Knotts*, 460 U.S. 276 (1983) (monitoring of beeper signals did not invade any legitimate expectation of privacy).

3. See *infra* text accompanying notes 7–99. Basically, the open fields doctrine provides that searches conducted outside the “curtilage,” or yard, are beyond the scope of the warrant requirements of the fourth amendment. Thus, incriminating evidence or conduct discovered during a warrantless search of non-curtilage areas is not barred from admission by the exclusionary rule.

to the fourth amendment.⁴ This doctrine, having fallen somewhat into disuse as a per se rule, was recently reaffirmed by the United States Supreme Court in *Oliver v. United States*,⁵ and is apparently intended to create an irrebuttable presumption of the validity of a warrantless search of open fields. While lower courts have begun to follow the *Oliver* holding,⁶ their criticisms of the decision and the difficulties they are encountering suggest that searches of open fields is an area in which the *Oliver* bright line rule is inappropriate.

In evaluating the open fields per se rule, this Comment will trace the development of the open fields doctrine and its relationship to fourth amendment analysis through the *Oliver* decision and its aftermath. Several defects of the open fields exception as a bright line rule will be examined: (1) the rule is based upon a nonmajoritarian body's assessment of social opinion; (2) it does not enhance law enforcement efficiency; (3) it undermines the privacy protection and police restraint goals of the fourth amendment; (4) it poses enormous potential problems for open-air businesses; and (5) it is incongruous with societal expectations. These defects render the rule inconsistent with fourth amendment analysis. Finally, several post-*Oliver* options available to courts dealing with open fields searches are presented.

II. THE OPEN FIELDS DOCTRINE

A. Hester v. United States

The Court first examined the constitutionality of warrantless searches of open fields⁷ in *Hester v. United States*.⁸ In *Hester*, revenue officers were investigating Hester's alleged involvement in the illegal manufacture of whiskey.⁹ While concealed on Hester's father's property without a warrant, fifty to one hundred yards from the house, an officer observed Hester hand a bottle to a third person named Henderson.¹⁰

4. The fourth amendment reads in full:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

Warrantless searches are per se unreasonable unless they fall within limited and well defined exceptions. *See, e.g., United States v. Ortiz*, 422 U.S. 891 (1975) (border searches); *United States v. Robinson*, 414 U.S. 218 (1973) (searches pursuant to arrest); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (consent searches); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (plain view searches); *Terry v. Ohio*, 392 U.S. 1 (1968) (stop and frisk searches); *Warden v. Hayden*, 387 U.S. 294 (1967) (searches under exigent circumstances, such as hot pursuit); *Carroll v. United States*, 267 U.S. 132 (1925) (automobiles). Cases and treatises listing these clearly defined exceptions to the warrant requirement do not include the open fields doctrine. *See, e.g., Katz v. United States*, 389 U.S. 347, 357 n.19 (1967); C. McCORMICK, *McCORMICK ON EVIDENCE* § 171 (3d ed. 1984).

5. 104 S. Ct. 1735 (1984).

6. *See, e.g., United States v. Webster*, 750 F.2d 307 (5th Cir. 1984); *United States v. Roberts*, 747 F.2d 537 (9th Cir. 1984); *Donovan v. A.A. Beiro Constr. Co.*, 746 F.2d 894 (D.C. Cir. 1984); *United States v. Williams*, 737 F.2d 594 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 1354 (1985); *United States v. Hoskins*, 735 F.2d 1006 (6th Cir. 1984); *United States v. Marbury*, 732 F.2d 390 (5th Cir. 1984); *Keyes v. City of Albany*, 594 F. Supp. 1147 (N.D.N.Y. 1984), *aff'd*, 753 F.2d 683 (8th Cir. 1985); *United States v. Eng*, 584 F. Supp. 458 (W.D. Mo. 1984).

7. Note, *Florida v. Brady: Can Katz Survive in Open Fields?*, 32 AM. U.L. REV. 921, 924 (1983).

8. 265 U.S. 57 (1924).

9. *Hester v. United States*, 265 U.S. 57, 57-58 (1924).

10. *Id.* at 58.

Upon hearing an alarm from his mother, Hester took another jug from his car and began to run with Henderson. The officers pursued them and one officer fired a pistol. Henderson and Hester dropped the bottle and the jug. Upon examination, the officers found that both the jug and the bottle contained whiskey.¹¹

Appealing his conviction for concealing spirits in violation of federal law, Hester argued to the Supreme Court that the evidence against him was the product of an illegal warrantless search and had therefore been admitted in violation of the fourth and fifth amendments.¹² Justice Holmes' opinion for the unanimous Court rejected Hester's contention that the search was illegal, declaring that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields."¹³

Thus the open fields doctrine was born—but not without troublesome ambiguities. In particular, the *Hester* Court failed to define the term "open fields," making the scope of the holding uncertain. It was unclear whether the Court intended to deny protection to any area beyond the curtilage¹⁴ of a home or whether it merely declared that a technical trespass by an officer is outside the fourth amendment.¹⁵

B. *Olmstead v. United States*

Some of the questions raised by the *Hester* decision were clarified four years later in *Olmstead v. United States*.¹⁶ In this decision, the Supreme Court examined the constitutionality of a warrantless search conducted by federal prohibition agents through the use of wiretaps on Olmstead's telephone line.¹⁷ The Court construed the fourth amendment very narrowly, holding that any trespass by the officers was irrelevant¹⁸ because the fourth amendment is violated only by an official, warrantless search and seizure of an individual's person, papers, home or effects, or an "actual physical invasion of his house 'or curtilage' ¹⁹ for the purpose of making a seizure."²⁰ Areas beyond the curtilage were open fields, and were thus unprotected by the fourth amendment. Since no search had been made of Olmstead's actual person, home or papers, the warrantless search was valid.²¹

Olmstead's contribution to the open fields doctrine was the locational or "constitutionally protected areas" test.²² Under this geographical analysis, whether a warrantless search violates the fourth amendment depends upon the classification of the area searched as a recognized constitutionally protected area. Since, by definition,

11. *Id.*

12. *Id.* at 57–58.

13. *Id.* at 59.

14. See *infra* notes 24–33 and accompanying text.

15. *Hester v. United States*, 265 U.S. 57, 58 (1924).

16. 277 U.S. 438 (1928), *overruled*, *Katz v. United States*, 389 U.S. 347 (1967).

17. *Id.* at 455.

18. *Id.* at 465.

19. See *infra* notes 24–33 and accompanying text.

20. *Olmstead v. United States*, 277 U.S. 438, 466 (1928).

21. *Id.*

22. Note, *supra* note 7, at 926.

an open field was not a protected area, the combined effect of *Hester* and *Olmstead* established a per se exception to the warrant requirement.²³

However, just as *Hester* failed to define the term "open fields," *Olmstead* failed to define the term "curtilage." Curtilage has been said to include the yard, garden or other area of ground immediately surrounding a dwelling, often enclosed by a fence,²⁴ or that area around a home used for family or domestic purposes.²⁵ Outbuildings have usually been considered within the curtilage as well.²⁶ Courts following *Olmstead* adopted a factual approach to the curtilage question.²⁷ Although many factors, such as the owner's use of the area,²⁸ were considered relevant under this analysis, the distance from the home to the searched area seems to have been the most important.²⁹ Lower courts' determinations were, as might be expected, somewhat arbitrary and conflicting. For example, the Court of Appeals for the Fifth Circuit in *Walker v. United States*³⁰ held that an outbuilding located 210–240 feet from a dwelling was within its curtilage,³¹ but then found in *Hodges v. United States*³² that an outbuilding only 150 feet from a dwelling was beyond the curtilage.³³

C. Katz v. United States

In the years following *Olmstead* the Court began to modify the protected areas analysis, suggesting that privacy interests, not property concepts, were the focus of the fourth amendment.³⁴ Finally, in *Katz v. United States*,³⁵ the Court rejected the protected areas doctrine altogether. The fourth amendment, declared the Court, protects "people, not places,"³⁶ from unreasonable searches and seizures; therefore the inquiry should not focus on the location of the search itself, but rather on the person and what he or she "seeks to preserve as private."³⁷ The location of the search was deemed relevant only to the extent that the nature and location of the area bore on the reasonableness of the privacy interests at stake. Thus, a flexible factual analysis

23. Justice Brandeis' well-known dissent in *Olmstead* criticized the majority opinion as reading the fourth amendment too narrowly, quoting Chief Justice Marshall in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) ("We must never forget . . . that it is a constitution we are expounding."). *Olmstead v. United States*, 277 U.S. 438, 472 (Brandeis, J., dissenting). Justice Brandeis contended that the goal of the fourth amendment was protection of privacy interests, not property interests, *id.* at 472–74, and called for a more flexible interpretation: "a principle to be vital must be capable of wider application than the mischief which gave it birth." *Id.* at 473. Note that Justice Holmes, the author of the *Hester* opinion, joined in the *Olmstead* dissent.

24. Comment, *The Relationship Between Trespass and Fourth Amendment Protection After Katz v. United States*, 38 OHIO ST. L.J. 709, 711 n.9 (1977).

25. Note, *supra* note 7, at 926–27 n.48.

26. See *United States v. Potts*, 297 F.2d 68, 69 (6th Cir. 1961).

27. See *Care v. United States*, 231 F.2d 22 (10th Cir.), *cert. denied*, 351 U.S. 932 (1956).

28. See *United States ex rel. Saiken v. Bensinger*, 546 F.2d 1292, 1296 (7th Cir.), *cert. denied*, 431 U.S. 930 (1976).

29. Note, *supra* note 7, at 927 n.51.

30. 225 F.2d 447 (5th Cir. 1955).

31. *Id.* at 448–49.

32. 243 F.2d 281 (5th Cir. 1957).

33. *Id.* at 283.

34. See, e.g., *Warden v. Hayden*, 387 U.S. 294, 305–06 (1967); *Silverman v. United States*, 365 U.S. 505, 511–12 (1961).

35. 389 U.S. 347 (1967).

36. *Id.* at 351.

37. *Id.*

for determining the scope of fourth amendment protection was substituted for the rigid locational test of *Olmstead*.

The defendant in *Katz* had been convicted for transmitting wagering information by telephone.³⁸ Evidence of telephone conversations recorded by electronic devices, attached by FBI agents to the outside of a public telephone booth, was admitted over *Katz*'s objection.³⁹ On appeal, the Court of Appeals for the Ninth Circuit considered both parties' arguments on whether a telephone booth is a protected area, and affirmed the conviction under an *Olmstead* analysis.⁴⁰ The United States Supreme Court, however, refused to follow either party's theory with respect to classifying a telephone booth as either protected or unprotected. Instead, Justice Stewart wrote for the majority that "the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area,'"⁴¹ which the Court had "never suggested . . . can serve as a talismanic solution to every Fourth Amendment problem."⁴² That analysis is untrue to fourth amendment principles, he added, because "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."⁴³ Thus, although an *Olmstead* locational analysis would have ended the fourth amendment inquiry upon proof that the officers never actually penetrated the booth,⁴⁴ the Court held that this premise had been discredited: "the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."⁴⁵ Instead, a search and seizure under the fourth amendment occurred when the government's activities "violated the privacy upon which [*Katz*] justifiably relied."⁴⁶

In a now-famous concurring opinion,⁴⁷ Justice Harlan set out a two-pronged test for the "constitutionally protected reasonable expectation of privacy"⁴⁸ standard established by the majority. The test, which has since become the standard for fourth amendment analysis, has both subjective and objective components, which require a showing "first that a person . . . [exhibit] an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"⁴⁹

38. *Id.* at 348.

39. *Id.*

40. *Katz v. United States*, 369 F.2d 130 (9th Cir. 1966), *rev'd*, 389 U.S. 347 (1967).

41. *Katz v. United States*, 389 U.S. 347, 350 (1967).

42. *Id.* at 351, n.9.

43. *Id.* at 351 (citations omitted).

44. *Id.* at 352.

45. *Id.* at 353.

46. *Id.*

47. *Id.* at 360 (Harlan, J., concurring).

48. *Id.*

49. *Id.* at 361.

D. The Open Fields Doctrine After *Katz*

While *Katz* did not specifically overrule *Hester*,⁵⁰ the question remained whether and to what extent the reasonable expectation of privacy test of *Katz* affected *Hester*'s open fields per se exception to the fourth amendment warrant requirement.⁵¹ Arguably, the Court in *Katz* declined to overrule *Hester* explicitly not out of a continuing deference to the validity of the open fields doctrine, but because the facts of *Hester* simply did not meet the *Katz* reasonable expectation of privacy test.⁵² In contrast, the facts of *Olmstead* suggest that a reasonable expectation of privacy could have been found in that case; *Katz* did reject *Olmstead*.

Most courts have held that *Katz* narrowed the open fields doctrine of *Hester*.⁵³ Even those courts which have found that *Katz* did not affect the open fields doctrine have applied the doctrine narrowly to cases in which there has been so little manifestation of an expectation of privacy that the *Katz* test even if applied would not be satisfied;⁵⁴ thus the open fields per se exception was not at issue. In *Air Pollution Variance Board v. Western Alfalfa Corp.*,⁵⁵ the Supreme Court found a pollution test of smoke emissions a valid search within the open fields exception, even though it was conducted by a health inspector trespassing on business premises for the purpose of performing the test.⁵⁶ The Court stressed, however, that the inspector saw only that which was visible to the public from outside the property, and that there had been no showing that the public had been excluded from the area entered by the inspector.⁵⁷

In addition to lower court decisions, commentary after *Katz* has supported the notion that the *Katz* test had eliminated the open fields doctrine as a per se exception.⁵⁸ Recognition of a reasonable expectation of privacy in open fields, it was

50. Although Justice Harlan's concurring opinion stated more explicitly that *Hester* meant there can be no reasonable expectation of privacy, the *Katz* majority declined to go that far. In a footnote, the majority in *Katz* noted that "[i]n support of their respective claims, the parties have compiled competing lists of 'protected areas' for our consideration. It appears to be common ground that a private home is such an area . . . but that an open field is not. *Hester v. United States*." *Katz v. United States*, 389 U.S. 347, 351 n.8 (1967). The language used suggests that the validity of the *Hester* holding was not specifically affirmed by the *Katz* Court on its merits, but was simply stipulated by both parties in *Katz*. Thus, it appears that the majority of the Court in *Katz* believed that the question of the validity of *Hester* was moot in light of the new analysis established in *Katz*, or at least that, because of the *Katz* parties' agreement, the Court declined to rule on the issue as beyond the scope of the case at bar.

51. See, e.g., *Silverman v. United States*, 365 U.S. 505, 513 (1960) (Douglas, J., concurring) (privacy of home, not local trespass law, is of primary concern in application of fourth amendment); *Warden v. Hayden*, 387 U.S. 294, 303-06 (1967) (fourth amendment is principally for protection of privacy, not property interests).

52. The opinion in *Hester* refers to no evidence of any attempt on the part of the defendant to exclude the public or to conceal the area. 265 U.S. 57, 57 (1924).

53. See, e.g., *United States v. Swart*, 679 F.2d 698, 702 (7th Cir. 1982) (*Katz* disposed of open fields per se exception); *United States v. Freie*, 545 F.2d 1217, 1223 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977) (*Hester* now only a factor to consider in evaluating expectation of privacy in open field); *People v. McClaugherty*, 193 Colo. 360, 566 P.2d 361 (1977) (*Katz* undermined open fields doctrine); *State v. Stanton*, 7 Or. App. 286, 490 P.2d 1274 (1971) (open fields doctrine is inconsistent with *Katz*).

54. See, e.g., *United States v. Cain*, 454 F.2d 1285, 1287 (7th Cir. 1972) (no warrant required for search of area ordinarily open to hunters).

55. 416 U.S. 861 (1974).

56. *Id.* at 865.

57. *Id.*

58. See, e.g., Burkhoff, *The Court That Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 OR. L. REV. 151 (1979); Gutterman, *Fourth Amendment Privacy and Standing: "Wherever the Twain Shall Meet,"* 60 N.C.L. REV. 1 (1981); Mickenberg, *Fourth Amendment Standing After Rakas v. Illinois: From Property to Privacy and Back*, 16 NEW ENG. L. REV. 197 (1981); Comment, *The Relationship Between Trespass and*

suggested, "would not seriously interfere with society's interest in law enforcement."⁵⁹ A per se locational exception to fourth amendment protection would be irreconcilable with *Katz* because the objective prong of the *Katz* standard will vary over time and place with shifts and variety in societal expectations.⁶⁰ It had therefore been proposed that the open fields doctrine be abandoned altogether and replaced with direct application of the *Katz* test to warrantless searches of open fields.⁶¹

The *Katz* test itself, however, has been criticized for focusing entirely upon the reasonableness of the conduct of individuals in their manifestations of expectations of privacy, rather than upon the nature of the privacy invaded or upon the government's conduct.⁶² Because of its limited focus, the *Katz* test can be seen as validating extremely intrusive government action if the individual subjected to the search has not taken reasonable steps to manifest a desire to maintain privacy.⁶³

Moreover, it has been suggested that the *Katz* test creates a circularity: fourth amendment protection is recognized by the courts—and therefore by society—when the defendant manifests a reasonable expectation of privacy. At the same time, however, under the objective prong of the *Katz* test, an expectation of privacy is reasonable only if it is believed by society—through the courts—to be protected by the fourth amendment.⁶⁴ Nevertheless, a per se exclusion of certain areas from fourth amendment protection would appear more manipulative of society's expectations,⁶⁵ and thus of the *Katz* standard, than a series of case-by-case determinations which likely would not consistently find warrantless searches of open fields reasonable.

III. OLIVER v. UNITED STATES

In *Oliver v. United States*,⁶⁶ two Kentucky State Police narcotics agents, acting on reports that marijuana was being grown on Ray Oliver's two-hundred-acre farm,⁶⁷ went to the farm without a warrant to investigate.⁶⁸ They arrived via a private road

Fourth Amendment Protection After Katz v. United States, 38 OHIO ST. L.J. 709 (1977); Note, *Katz in Open Fields: United States v. Oliver*, 20 AM. CRIM. L. REV. 485 (1983); Note, *Property Law and Fourth Amendment Privacy Protection*, 58 NEB. L. REV. 1123 (1979); Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U. L. REV. 968 (1968); Note, *How Open Are Open Fields?* *United States v. Oliver*, 14 U. TOL.L. REV. 133 (1982).

59. Note, *Katz in Open Fields*, *supra* note 58, at 502.

60. *Id.* at 503.

61. *Id.*

62. Gutterman, *supra* note 58, at 5. Justice Holmes addressed this issue in his dissenting opinion in *Olmstead*: "[F]or my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part." 277 U.S. 438, 470 (Holmes, J., dissenting).

A parallel issue is faced in problems of standards for entrapment defense. See, e.g., *Sherman v. United States*, 356 U.S. 369 (1958) (defendant's conduct ought to be wholly irrelevant to the entrapment determination: "The crucial question . . . is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of Government power.") *Id.* at 382 (Frankfurter, J., concurring). In his *Sherman* concurrence, Justice Frankfurter cited Justice Holmes' language in *Olmstead* with approval. *Id.* at 380.

63. Gutterman, *supra* note 58, at 5.

64. Mickenberg, *supra* note 58, at 209-10.

65. See Gutterman, *supra* note 58, at 57.

66. 104 S. Ct. 1735 (1984).

67. *United States v. Oliver*, 686 F.2d 356, 361 (6th Cir. 1982) (Keith, J., dissenting).

68. *Oliver v. United States*, 104 S. Ct. 1735, 1738 n.1 (1984).

which they knew was owned by Oliver⁶⁹ and which was marked with several "No Trespassing" signs.⁷⁰ The agents then walked around a locked gate, which also bore a "No Trespassing" sign, and continued along the road for several hundred yards, despite a shouted warning from an unknown person, "No hunting is allowed, come back here."⁷¹ Marijuana was found growing in a field more than a mile from Oliver's home.⁷² This field was "highly secluded,"⁷³ surrounded by woods, fences, embankments,⁷⁴ and a river,⁷⁵ and could be seen only by a person standing on Oliver's land.⁷⁶ Oliver was arrested and indicted for the manufacture of a controlled substance.⁷⁷

The District Court for the Western District of Kentucky granted Oliver's motion to suppress the evidence of the marijuana. Finding the open fields doctrine obsolete, the court applied the *Katz* test to the facts and, finding that Oliver had a reasonable expectation of privacy in the area, the warrantless search was improper.⁷⁸ A panel of the Sixth Circuit Court of Appeals affirmed,⁷⁹ agreeing that *Katz* had modified *Hester*. The circuit court, however, upon rehearing en banc, reversed in a five-to-four decision.⁸⁰ The court held that "any expectation of privacy that an owner might have with respect to his open field is not, *as a matter of law*, an expectation that society is prepared to recognize as reasonable."⁸¹ The court therefore affirmed the open fields doctrine as a per se exception to the *Katz* reasonable expectation of privacy test.

In affirming the Court of Appeals' decision, the United States Supreme Court agreed that as a matter of law there can be no reasonable expectation of privacy in open fields.⁸² Irrespective of an individual's attempts to exclude others from an open field, the impossibility of viewing (except by aerial search) activities in such an area, or the subjective expectation of privacy of the owner, there can never be a privacy interest in open fields that society would recognize as legitimate.⁸³ The Court's reasoning in *Oliver* echoed that in *Olmstead*: the language of the fourth amendment, said the Court, speaks only to "persons, houses, papers and effects," and not to open fields.⁸⁴ The Court concluded that, since any such expectation of privacy is per se unreasonable, the open fields doctrine is consistent with the *Katz* analysis of the fourth amendment.⁸⁵

Justice Marshall, joined by Justices Brennan and Stewart, dissented,⁸⁶ challeng-

69. *United States v. Oliver*, 686 F.2d 356, 362 (6th Cir. 1982) (Keith, J., dissenting).

70. *Id.*

71. *Oliver v. United States*, 104 S. Ct. 1735, 1738 (1984).

72. *Id.*

73. *United States v. Oliver*, 686 F.2d 356, 362 (6th Cir. 1982) (Keith, J., dissenting).

74. *Id.*

75. *Id.* at 358.

76. *Id.*

77. 21 U.S.C. § 841(a)(1) (1976). *Oliver v. United States*, 104 S. Ct. 1735, 1738 (1984).

78. *United States v. Oliver*, No. CR-80-00005-BG, slip op. (W.D. Ky. Nov. 19, 1980) (order suppressing evidence).

79. *United States v. Oliver*, 657 F.2d 85, 88 (6th Cir. 1981).

80. *United States v. Oliver*, 686 F.2d 356 (6th Cir. 1982).

81. *Id.* at 360 (emphasis in original).

82. *Oliver v. United States*, 104 S. Ct. 1735, 1741 (1984).

83. *Id.*

84. *Id.* at 1740.

85. *Id.* at 1744.

86. *Id.* (Marshall, J., dissenting).

ing the majority's "startling conclusion"⁸⁷ that the police conduct in *Oliver* "does not constitute an 'unreasonable search' with the meaning of the Fourth Amendment."⁸⁸ First, the dissent observed that the majority's linguistic argument was inconsistent with many of the Court's decisions that had recognized as protected such areas as offices, the curtilage of a dwelling, and telephone booths, even though these areas are not "covered by the plain language of the Amendment."⁸⁹ Second, the per se exception of open fields was inconsistent with the fourth amendment's coverage of "people, not places."⁹⁰ Finally, the dissent asserted that three main criteria traditionally used by the Court⁹¹ in assessing the reasonableness of an expectation of privacy were all met in *Oliver*: (1) "whether the expectation at issue is rooted in entitlements defined by positive law"; (2) "the nature of the uses to which spaces of the sort in question can be put"; and (3) "whether the person claiming a privacy interest manifested that interest to the public in a way that most people would understand and respect."⁹²

Rejecting the majority's conclusion that society would not recognize as reasonable the expectations of privacy claimed in *Oliver*,⁹³ the dissent recommended a rule that would hold as protected under the fourth amendment "private land marked in a fashion sufficient to render entry thereon a criminal trespass under the law of the state in which the land lies."⁹⁴ The dissent suggested that this rule would be "easily administrable"⁹⁵ because it would rest upon a body of law already familiar to police, thus avoiding "on-the-spot judgments as to how far the curtilage extends."⁹⁶

In addition, the dissent observed that the suggested rule would avoid the per se exception's potential danger of making trespass less offensive to society as a whole, whereas the majority's rule would, by police example, encourage trespass by private individuals.⁹⁷ When police are routinely allowed to engage in certain conduct, that conduct "will gradually become less offensive to us all."⁹⁸ Quoting Justice Brandeis' dissent in *Olmstead*, Justice Marshall explained, "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for the law."⁹⁹

87. *Id.*

88. *Id.*

89. *Id.* at 1745.

90. *Id.* at 1746. See *supra* note 36 and accompanying text.

91. *Oliver v. United States*, 104 S.Ct. 1735, 1738 (1984).

92. *Id.* at 1746-50. "An owner's right to insist that others stay off his posted land is firmly grounded in positive [property] law." *Id.* at 1750. "Many of the uses to which such land may be put [such as taking a walk, meeting a lover, worshipping, and engaging in creative endeavors,] deserve privacy." *Id.* at 1748-50. "And, by marking the boundaries of the land with warnings that the public should not intrude, the owner has dispelled any ambiguity as to his desires." *Id.* at 1750.

93. *Id.* at 1747.

94. *Id.* at 1750.

95. *Id.*

96. *Id.*

97. *Id.* at 1751, n.21.

98. *Id.*

99. *Id.*, quoting *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (See *supra* note 23). See also *Spano v. New York*, 360 U.S. 315 (1959) (there is a "deep-rooted feeling that the police must obey the law while

IV. THE OPEN FIELDS DOCTRINE AS A BRIGHT LINE RULE

The Supreme Court's affirmation of the open fields per se exception is not surprising in light of its recent preference for bright line rules.¹⁰⁰ Even accepting the position that it is desirable to have a bright line rule in the area of open fields searches, it does not follow that a per se exception of all areas beyond the curtilage is the only possible—or even the best—place to draw that line. Many of the open fields doctrine's shortcomings as a bright line rule are those for which bright line rules in general are criticized. Additional problems, however, inhere specifically to the open fields doctrine, including the treatment of searches of open-air businesses and the apparently disparate levels of protection afforded to individuals on their own and on others' open-air property.

A. *Institutional Competency*

Even when bright line rules are desirable and can be written with the appropriate narrowness, legislatures are arguably often better suited to create them than are the courts.¹⁰¹ Many rules, both statutory and judge-made, include an objective component: a "reasonableness" standard. This standard is deliberately ambiguous, recognizing the difficulty of framing a rigid standard that would achieve just results under varying fact patterns, and leaves to the trier of fact the task of labeling a specific act as reasonable or unreasonable. The influence of current public opinion and values is thereby implicitly recognized. When either a court or a legislature undertakes to replace a reasonableness standard with a bright line rule for certain factual situations, it is in effect substituting its judgment for that of future triers of fact by declaring that certain behavior is or is not reasonable as a matter of law. If the rule is to reflect societal values, however, there must be some reason to expect that the lawmaking body creating the rule is able to assess public values and opinions accurately. While a legislature's reasoning in general may be no sounder than a court's, it is a representative, majoritarian body, and thus arguably has a better sense of public opinion than has a court.

Oliver provides an example. The majority opinion's reasoning is flawed because it relied on a premise which is questionable at best: that there is no possible privacy interest one could have in open fields that society would recognize as reasonable. The Court takes a large presumptive leap in attempting to reconcile the open fields doctrine with *Katz*. Even assuming that society has not thus far accepted as reasonable any expectation of privacy in an open field, this is not to say that society's assessment could never change under different circumstances. It is inevitable that shifting social values will raise the question whether the open fields doctrine is rigid, or whether, to remain consistent with *Katz*, it can be modified to track current thought. The Court claims to rest its holding on public sentiment; yet the public might well find the

enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Id.* at 320–21.).

100. See *supra* note 1 and accompanying text.

101. See Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 234 n.28 (1984).

Court's distinctions between indoor and outdoor business owners' expectations of privacy¹⁰² and between curtilages and open fields, less reasonable than the complete exclusion of some types of private property.¹⁰³ In light of this very real possibility, the Court appears to be only an inaccurate barometer of public opinion; perhaps, therefore, the Court should exercise greater restraint in stating that opinion as a matter of law. In contrast, while legislatures are not perfect indicators of society's expectations, their majoritarian and political characteristics suggest that if there must be a rule purporting to replace the objective prong of the *Katz* test, they would be the better source of that rule.

B. Efficiency of Law Enforcement

The Court itself noted in *Oliver* that eliminating the per se open fields exception "merely would require law enforcement officers, in most situations, to use aerial surveillance to gather the information necessary to obtain a warrant or to justify warrantless entry onto the property."¹⁰⁴ Courts usually have held aerial searches reasonable.¹⁰⁵ The Court thereby undercuts its own reasoning by suggesting that only police inconvenience and not nondisclosure of evidence would be risked by abandonment of the per se open fields exception.

Yet the Supreme Court has, on many occasions, refused to place efficiency of governmental interests, including law enforcement, above constitutional protection of individuals' rights and privacy interests. The Court itself has stated that "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment."¹⁰⁶

Due process concerns may arise as well. In *Stanley v. Illinois*¹⁰⁷ Justice White acknowledged that

the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights . . . that [it was] designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.¹⁰⁸

102. See *infra* notes 156-87 and accompanying text.

103. See, e.g., *Rakas v. Illinois*, 439 U.S. 128 (1978) (property rights, though no longer determinative of the scope of fourth amendment protection, nevertheless "reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, [and thus] should be considered in determining whether an individual's expectations of privacy are reasonable.") *Id.* at 153 (Powell, J., concurring).

104. *Oliver v. United States*, 104 S. Ct. 1735, 1741 n.9 (1984).

105. See, e.g., *United States v. Allen*, 675 F.2d 1373, 1381 (9th Cir. 1980). One post-*Oliver* case has, however, held that aerial surveillance of a fenced backyard violates the fourth amendment, *People v. Ciraolo*, 161 Cal. App. 3d 1081, 208 Cal. Rptr. 93 (1984), and another found that aerial surveillance of a greenhouse located in a secluded rural area not frequented by low-flying aircraft was an unreasonable search under *Katz* and thus violated the fourth amendment. *Blalock v. State*, 476 N.E. 2d 901 (Ind. Ct. App. 1985).

106. *Mincey v. Arizona*, 437 U.S. 385, 393 (1978). See also *United States v. Ross*, 456 U.S. 798 (1982) ("[E]fficiency . . . can never be substituted for due process and adherence to the Constitution. Is not a dictatorship the most 'efficient' form of government?") *Id.* at 842 n.13 (Marshall, J., dissenting).

107. 405 U.S. 645 (1972).

108. *Id.* at 656.

Specifically, the Court has noted that the incremental protection of privacy afforded even to nonresidential property by a warrant requirement is ample to justify the resulting administrative inconvenience.¹⁰⁹ While authority to conduct a warrantless search would give officers so much discretion as to invite abuse, a required warrant "would provide assurances from a neutral officer that the inspection is reasonable under the Constitution."¹¹⁰

Complications surrounding the per se open fields exception undercut the simplification objective of a bright line rule. The curtilage analysis will very likely follow the invocation of the per se exception any time a defendant can hope to show that an area searched could somehow be seen as within a curtilage. Resort to the curtilage analysis seems likely, as *Oliver* left no alternative reasonable expectation of privacy analysis, and the definition of curtilage is so vague as to invite defendants to try to show the curtilage extends to the area searched in his or her case.

The purpose of the per se exception is to eliminate the need for police officers to make on-the-spot decisions about subtle issues of the objective and subjective reasonableness¹¹¹ of an individual's expectation of privacy. However, if defendants do, as predicted, resort to contending that the area searched without a warrant should be considered within the curtilage, the net result of the attempt to avoid the *Katz* analysis will be only the substitution of another complex inquiry: is the area to be searched within the curtilage? Since curtilage is such a vague concept, simply calling an area an open field is merely conclusory.¹¹² Moreover, since there is an abundance of post-*Katz* case law and commentary defining, applying, and explaining the reasonable expectation of privacy test, while the very definition of curtilage, let alone sophisticated exegesis of the concept, remains murky, this new analysis may well be less conducive to police efficiency than the *Katz* test it supplants.

Lower courts are already struggling with this new problem created by *Oliver*. For example, in *United States v. Hoskins*,¹¹³ a case factually very similar to *Oliver*, the Court of Appeals for the Sixth Circuit followed the *Oliver* holding in applying the per se open fields exception with such obvious reluctance that one judge felt compelled to write a concurring opinion¹¹⁴ agreeing with both the majority's reasoning and its conclusion, but dissociating himself from language in the majority opinion which strongly suggested that the United States Supreme Court had decided *Oliver* not only incorrectly, but incomprehensibly.¹¹⁵

The curtilage question has already arisen as well. In *United States v. Marbury*¹¹⁶ the search of a gravel supply company, conducted under a warrant obtained on the basis of information gathered in unwarranted aerial surveillance of the property, was held valid under the fourth amendment by the Fifth Circuit Court of Appeals. Even

109. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 322 (1978).

110. *Id.* at 323.

111. Both are required by the *Katz* analysis. See *supra* text accompanying note 49.

112. *United States v. Arboleda*, 633 F.2d 985, 992 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981).

113. 735 F.2d 1006 (6th Cir. 1984).

114. *Id.* at 1008 (Nichols, J., concurring).

115. *Id.*

116. 732 F.2d 390 (5th Cir. 1984).

if the warrant had been invalid, said the court, "the 'open fields' doctrine, as reaffirmed and explained in the Supreme Court's recent opinion in *Oliver v. United States*, would appear to be fully applicable to authorize entry onto and observations of the plainly noncurtilage portions of [a] large tract."¹¹⁷ The court did not offer any suggestion to guide officers making the determination that whether an area is "plainly noncurtilage," beyond mentioning that "sand dunes and roadways an eighth of a mile from the vehicle shed"¹¹⁸ were "plainly noncurtilage" areas.¹¹⁹ Perhaps recognizing the poorly-charted legal sea into which it was headed, the court dropped the curtilage analysis without further comment. It ultimately held that the search was valid on other grounds: the warrant was in fact valid,¹²⁰ and in any event, the plain view doctrine applied to the facts.¹²¹

The analysis of the United States District Court for the Western District of Missouri in *United States v. Eng*,¹²² decided just one week after *Oliver*, goes beyond *Marbury*'s suggestion of measurement of a curtilage. In an order denying the defendants' joint motion to suppress marijuana seized from a processing area, the court accepted the report of the chief magistrate that the processing area

was not within the curtilage because (a) the processing area was situated in a wooded area, (b) the processing area was situated approximately 350 to 375 yards from the basement house and approximately 100 to 125 yards from the shed, (c) the area between the shed and processing area was bare of structures or fences, and (d) there was no indication of domestic use and enjoyment of the processing area.¹²³

Although the court shared no more of its reasoning behind the dispositive effect of these facts, its conclusions reveal a Procrustean application of the awkward curtilage analysis to a set of facts that can be better weighed in a *Katz* reasonable expectation of privacy test. For example, the second factor—the distance between the area searched and a basement house and shed—is precisely the sort of geographic or locational test that moved the Court in *Katz* to reject the *Olmstead* analysis in favor of a less arbitrary, privacy-oriented test. The remaining three factors identified suggest that the curtilage analysis is no less subtle and complex than the *Katz* reasonable expectation of privacy test, thus defeating the purpose of the per se exception.

Several state courts attempting to follow *Oliver* have found themselves struggling with factors of distance from a dwelling, use of the area searched, and other factors that are traditionally part of the *Katz* analysis. The results are predictably as conflicting and confusing as those reached decades ago by courts trying to follow

117. *Id.* at 398 (citation omitted) (emphasis added).

118. *Id.* at 398. The stolen equipment, for whose transportation, receipt, and concealment defendants had been convicted, was found in the shed. *Id.* at 393, 398.

119. *Id.* at 398.

120. *Id.* at 399.

121. *Id.* In brief, the plain view exception to the warrant requirement provides that "when a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully present at the vantage point where those senses are used, that detection does not constitute a 'search' within the meaning of the Fourth Amendment." 1 W. LAFAYETTE, SEARCH AND SEIZURE § 2.2 at 240 (1978).

122. 584 F. Supp. 458 (W.D. Mo. 1984).

123. *Id.* at 460.

Olmstead.¹²⁴ For example, a Florida court of appeals has held that a marijuana patch only forty feet from the defendant's home was not within the curtilage because "it did not lie within a common fence or enclosure and was manifestly used for commercial rather than for family or domestic purposes associated with a dwelling."¹²⁵ By contrast, a North Carolina court of appeals found that a marijuana patch within a brush pile eighty-four feet behind the defendant's home *was* within the curtilage.¹²⁶ This court emphasized facts such as the presence of sown and mown grass between the house and the marijuana patch, and of a privy and cider press, still in use, which were behind the brush pile.¹²⁷

The foregoing discussion suggests that the curtilage analysis likely to be triggered by use of the *per se* exception is not simpler than the *Katz* reasonable expectation of privacy test. Alternatively, it could be argued that the two analyses are actually quite similar for purposes of the simplification of evidentiary evaluations. In *Eng*, for example, the four curtilage analysis factors—location of the processing area in a wooded area, its distance from the shed and basement house, the absence of structures or fences, and the absence of evidence of domestic use of the area—would all be considered under a *Katz* analysis as well. In fact, the *Oliver* majority used *Katz*-type language in noting that, under the common law it reaffirmed, curtilage is defined "by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private."¹²⁸ It is ironic that in attempting to find a simpler analysis, the *Oliver* decision may well have multiplied the confusion by resurrecting the arbitrary, vague, and problematic curtilage/location analysis of *Olmstead* and simultaneously continuing to weigh the same factors considered under a *Katz* reasonable expectation of privacy test.

Moreover, in some cases, analyzing a single factor could yield paradoxical results. In *Eng*, the situation of the searched area in the woods could be used to support conflicting assertions: (1) under a locational analysis, the area should not be considered within the curtilage, and therefore a warrant was not required; and (2) under a *Katz* analysis, the defendant's expectation of privacy was reasonable and therefore a warrant was required. Since, following *Oliver*, the classification *vel non* of the searched area as an "open field" (that is, *beyond* the curtilage) determines whether a *Katz* analysis ought to be applied at all, it is illogical that a factor which would cut one way for the threshold question would cut the other way at the next analytical step. By way of illustration, on the facts of *Eng*, the wooded area was found to have weighed against the area's being within a "curtilage," so the *Katz* analysis is never reached.¹²⁹ Yet if the same area were so thoroughly defoliated that its

124. See *supra* notes 30–33 and accompanying text.

125. *Masters v. State*, 453 So. 2d 183, 184 (Fla. Dist. Ct. App. 1984). See also *State v. Neale*, No. 82–222 (Vt., filed Mar. 1, 1985) (garden 400 feet away, across road, not within curtilage).

126. *State v. Burch*, 70 N.C. App. 444, 320 S.E.2d 28 (1984).

127. *Id.* 320 S.E. 2d at 30.

128. *Oliver v. United States*, 104 S. Ct. 1735, 1742 (1984). See *Keyes v. City of Albany*, 594 F. Supp. 1147 (N.D.N.Y. 1984).

129. See also *Bedell v. State*, 257 Ark. 895, 521 S.W.2d 200 (1975), *aff'd*, 260 Ark. 401, 541 S.W.2d 297 (1976), *cert. denied*, 430 U.S. 931 (1977) (wooded areas are not protected by the fourth amendment).

vegetation no longer worked against it, and, on balance, the court found that the area now was within the curtilage, the very same lack of foliage could lead the trier of fact to conclude that the defendant did not have a reasonable expectation of privacy in such an open area,¹³⁰ or even (depending upon the position of the officer) that the "plain view" exception would apply.

In the short time since *Oliver*, many of the pre-*Katz* problems of the locational analysis have arisen anew: What is the definition of "curtilage"?¹³¹ How far does a curtilage extend?¹³² Is a curtilage afforded the same protection as a dwelling, or less?¹³³ Has only a dwelling a curtilage, or have other buildings (such as the shed in *Eng*) curtilages, too?¹³⁴ Does a fence mark the extent of a curtilage?¹³⁵ Does use of an area, or only its proximity to a building, affect the classification of an area as a curtilage?¹³⁶ If use is relevant, what uses will suffice? With what frequency must these uses occur?¹³⁷ Do businesses have curtilages?¹³⁸ What rules apply to open-air businesses? The last two questions posed raise a potentially major area of controversy, which is discussed below.¹³⁹

C. The Open Fields Exception and the Goals of the Fourth Amendment

Perhaps the most serious problem with the choice of the open fields per se exception as a bright line rule in fourth amendment analysis is that it is addressed only to efficiency of law enforcement and runs too far afield of the fourth amendment's purposes. In its 1978 decision in *Rakas v. Illinois*,¹⁴⁰ the United States Supreme Court rejected a related bright line—the "legitimately on premises" rule¹⁴¹—as "blind adherence to a phrase which at most has superficial clarity and . . . conceals underneath that thin veneer all of the problems of line drawing which must be faced in any

130. See *United States v. Lace*, 669 F.2d 46, 56 (2d Cir. 1982) (Newman, J., concurring in the result) ("[O]bviously . . . the extent of surrounding trees and shrubs . . . [is] relevant in assessing the reasonableness of an expectation of privacy." *Id.*).

131. See *United States v. Hoskins*, 735 F.2d 1006 (6th Cir. 1984); *Keyes v. City of Albany*, 594 F. Supp. 1147 (N.D.N.Y. 1984); *United States v. Eng*, 584 F. Supp. 458 (W.D. Mo. 1984); *People v. Ciraolo*, 161 Cal. App. 3d 1081, 208 Cal. Rptr. 93 (1984).

132. See *United States v. Hoskins*, 735 F.2d 1006 (6th Cir. 1984); *United States v. Eng*, 584 F. Supp. 458 (W.D. Mo. 1984); *Masters v. State*, 453 So. 2d 183 (Fla. Dist. Ct. App. 1984); *State v. Burch*, 70 N.C. App. 444, 320 S.E.2d 28 (1984); *State v. Neale*, 491 A.2d 1025 (Vt. 1985).

133. The *Oliver* opinion expressly left this question open. *Oliver v. United States*, 104 S. Ct. 1735, 1742 n.11 (1984). See *Keyes v. City of Albany*, 594 F. Supp. 1147 (N.D.N.Y. 1984); see also *People v. Ciraolo*, 161 Cal. App. 3d 1081, 208 Cal. Rptr. 93 (1984).

134. See *United States v. Eng*, 584 F. Supp. 458 (W.D. Mo. 1984).

135. *Id.* See also *People v. Ciraolo*, 161 Cal. App. 3d 1081, 208 Cal. Rptr. 93 (1984).

136. *People v. Ciraolo*, 161 Cal. App. 3d 1081, 208 Cal. Rptr. 93 (1984); see also *Rodriguez v. State*, 468 So.2d 312 (Fla. Dist. Ct. App. 1984); *Blalock v. State*, 476 N.E.2d 901 (Ind. Ct. App. 1985).

137. See *United States v. Marbury*, 732 F.2d 390 (5th Cir. 1984); *United States v. Eng*, 584 F. Supp. 458 (W.D. Mo. 1984).

138. See *United States v. Webster*, 750 F.2d 307 (5th Cir. 1984) (airplane runway); *United States v. Marbury*, 732 F.2d 390 (5th Cir. 1984) (commercial gravel pit); *Donovan v. A.A. Beiro Constr. Co.*, 746 F.2d 894 (D.C. Cir. 1984) (construction site).

139. See *infra* notes 159–88 and accompanying text.

140. 439 U.S. 128 (1978).

141. The "legitimately on premises" rule states that anyone legitimately on premises where a search occurs has standing to challenge the validity of the search when its fruits are to be used against him or her. *Jones v. United States*, 362 U.S. 257, 267 (1960).

conscientious effort to apply the Fourth Amendment."¹⁴² The Court found the defendant's reasonable expectation of privacy to be paramount. Therefore, a case-by-case, factual analysis (in which legitimate presence is relevant but not determinative) was favored over a bright line rule when such an important interest was at stake.¹⁴³ Similarly, while the *Oliver* bright line arguably could simplify law enforcement,¹⁴⁴ it fails to take account of the privacy protection goal of the fourth amendment by avoiding the privacy analysis altogether.¹⁴⁵

The *Oliver* majority's response to this problem was to declare that the *Katz* analysis is properly avoided because it can never be more than a futile exercise: there simply never can be any possible privacy interest in open fields that society would recognize as reasonable.¹⁴⁶ The dissent found this to be a "startling conclusion,"¹⁴⁷ and named several uses of privately owned open fields "that society acknowledges deserve privacy," including religious gatherings, artistic pursuits, lovers' meetings, and wildlife refuges.¹⁴⁸ While the majority rejected this protest out of hand as based on "unreality,"¹⁴⁹ its reasoning is flawed. Since the police, in investigating crime, do expect to find some sort of activity going on in the place searched, then by hypothesis, they necessarily intend to disturb someone or something.

The most troubling aspect of the Court's remarks on this point is that its language clearly expresses an interest in only the usual, not the less frequent case: "[I]n most instances police will disturb no one when they enter upon open fields. These fields . . . are unlikely to provide the setting for activities whose privacy is sought to be protected by the Fourth Amendment."¹⁵⁰ Yet the fourth amendment, as the Bill of Rights generally, stands for the protection of minority interests in the face of majoritarian pressure.¹⁵¹ Since the Court apparently recognizes that there will be some occasions where a *Katz*-recognizable reasonable privacy interest will occur in open fields, the establishment of a per se definitional exclusion in place of a case-by-case *Katz* inquiry seems contrary not only to the goals of the fourth amendment, but also to the majority's own premise that the open fields doctrine "is consistent with respect for 'reasonable expectations of privacy,'"¹⁵² and thus with *Katz*.

The same language exposes a related flaw in the Court's reasoning. Open fields, says the Court, are "unlikely to provide the setting for activities whose privacy is sought to be protected by the Fourth Amendment."¹⁵³ Yet if the same activities occurred in the home, the fourth amendment would apply. The Court's language

142. *Rakas v. Illinois*, 439 U.S. 128, 147 (1978).

143. *Id.* at 147-48.

144. *But see supra* notes 104-39 and accompanying text.

145. Note that privacy is only one of several interests protected by the fourth amendment. *See infra* note 155 and accompanying text.

146. *Oliver v. United States*, 104 S. Ct. 1735, 1741 (1984).

147. *Id.* at 1744 (Marshall, J., dissenting).

148. *Id.* at 1748-49 (Marshall, J., dissenting).

149. *Id.* at 1741-42 n.10.

150. *Id.* (emphasis added).

151. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW ch. 12, § I, at 412 (2d ed. 1983).

152. *Oliver v. United States*, 104 S. Ct. 1735, 1742 (1984).

153. *Id.* at 1741-42 n.10.

suggests that it is "private activity"¹⁵⁴ itself, not merely the sanctity of the home, that is protected by the fourth amendment. If this is the case, then these activities should be no less worthy of protection when they happen to be conducted outdoors.

Nor does the fourth amendment protect only privacy interests. Property interests, as well, have been recognized as underlying fourth amendment limits on government intrusion.¹⁵⁵ Although property interests are clearly implicated by searches conducted in open fields, the *Oliver* decision ignores this issue entirely.

D. Impact on Searches of Open-Air Businesses

In addition to the problems inherent in reconciling the *Oliver* per se exception with *Katz*, there is a strong possibility that courts will have difficulty in reconciling *Oliver* with another line of cases pertaining to searches of business premises. The *Oliver* opinion rested on the assumption that "[t]here is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields."¹⁵⁶ In so stating, the Court seems to have ignored the many types of business which are conducted outdoors. Are outdoor business premises excluded from fourth amendment protection under the "open fields" exception? In one of the few post-*Oliver* cases involving a search of outdoor business premises, a federal district court raised this question, but avoided it by finding that the search in that case had been authorized by consent.¹⁵⁷ In another post-*Oliver* decision, the Court of Appeals for the Fifth Circuit avoided the problem because the government had conceded at oral argument that the area in question was "probably within the curtilage."¹⁵⁸

In *Marshall v. Barlow's, Inc.*¹⁵⁹ the United States Supreme Court held that "[t]he Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes. To hold otherwise would belie the origin of that Amendment."¹⁶⁰ At issue in *Barlow's* was a warrantless Occupational Safety and Health Administration (OSHA) inspection of the non-public area of the defendant's electrical and plumbing installation business.¹⁶¹ The Court relied on its own precedents in holding that a warrant is required for inspections of commercial premises¹⁶² no less than for inspections of private dwellings.¹⁶³

While restrictions pertaining to searches of residential property¹⁶⁴ apply to searches of commercial property for evidence of crime or for contraband,¹⁶⁵ greater

154. *Id.*

155. See, e.g., *State v. Elkins*, 245 Or. 279, 422 P.2d 250 (1966).

156. *Oliver v. United States*, 104 S. Ct. 1735, 1741 (1984).

157. *Donovan v. A.A. Beiro Constr. Co.*, 746 F.2d 894 (D.C. Cir. 1984).

158. *United States v. Webster*, 750 F.2d 307, 317 n.8 (5th Cir. 1984).

159. 436 U.S. 307 (1978).

160. *Id.* at 311.

161. *Id.* at 310-11.

162. *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967).

163. See *v. City of Seattle*, 387 U.S. 541 (1967).

164. A warrant is required to enter a private home to conduct a search or make an arrest, absent consent or exigent circumstances. *Steagold v. United States*, 451 U.S. 204 (1981); *Payton v. New York*, 445 U.S. 573 (1980). See *supra* note 4.

165. *Donovan v. Dewey*, 452 U.S. 594, 598 n.6 (1981); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 352-59 (1977).

latitude is afforded the government in conducting warrantless administrative inspections of commercial property.¹⁶⁶ Certain industries fall under an exception to the warrant requirement: (1) "pervasively regulated business[es]"¹⁶⁷ and (2) "closely regulated" industries "long subject to close supervision and inspection."¹⁶⁸ The Court in *Barlow's* stressed, however, that these cases represent the exception, not the rule.¹⁶⁹ The exception applies only to "carefully defined classes of cases" that are distinguished from "ordinary businesses [by] a long tradition of close government supervision,"¹⁷⁰ such as liquor¹⁷¹ and firearms.¹⁷² Mere federal supervision of other businesses involved in interstate commerce is insufficient to classify them as within the exception.¹⁷³

While the assumption that most dwellings are indoors seems a safe one for the Court to have made, many types of businesses are conducted in part or wholly outdoors. Persons engaged in these enterprises may be greatly interested in conducting their activities in private. A farmer might be growing a patentable new strain of soybean or a horticulturist could be testing a new fertilizer. Both of them, as well as an athletic coach, a race horse breeder, a golf course owner, a bee keeper, a rancher, or a car dealer, might well assert as societally recognizable interests in keeping their activities private, as could those whose businesses can conveniently be conducted indoors.

If the open fields exception does not apply as an exception to *Barlow's* as well as to *Katz*, there is the odd result that the fourth amendment protects business premises more than it protects homes. If, as would seem more logical, *Oliver* limits *Barlow's* in the same fashion as it does *Katz*, several questions arise.

First, a business could claim fourth amendment protection under *Oliver* for its outdoor activities only if the area searched was within the curtilage. It is unclear, however, whether nonresidential buildings may be said to have curtilages at all. While the few courts that have considered the question directly have generally concluded that only a private dwelling has a curtilage,¹⁷⁴ the United States Supreme Court suggested a contrary view in *Adderley v. Florida*¹⁷⁵ when it held that the State of Florida had the right to exclude demonstrators from "what amounted to the curtilage of [a county] jail house."¹⁷⁶ The possibility that this language reflected classification of the jail as more like a dwelling than like nonresidential premises for fourth amendment purposes was dispelled by the Court's recent statement in *Hudson v. Palmer*¹⁷⁷ that "a prison 'shares none of the attributes of privacy of a home.'"¹⁷⁸

166. *Donovan v. Dewey*, 452 U.S. 594, 598 (1981).

167. *United States v. Biswell*, 406 U.S. 311, 316 (1972).

168. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 74, 77 (1970).

169. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978).

170. *Id.*

171. *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).

172. *United States v. Biswell*, 406 U.S. 311 (1972).

173. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978).

174. *See, e.g.*, *United States v. Potts*, 297 F.2d 68, 69 (6th Cir. 1961); *United States v. Vlahos*, 19 F. Supp. 166, 170 (D. Or. 1937).

175. 385 U.S. 39 (1966).

176. *Id.* at 47.

177. 104 S. Ct. 3194 (1984).

If non-residential property, such as the businesses discussed here, can be found to have a curtilage, would the definitions of curtilage for residences apply to businesses as well? Or, since those definitions which have been advanced refer frequently to domestic use and proximity to living quarters,¹⁷⁹ would new definitions be necessary to supplement or replace those used for residential premises? Prior to *Katz* and *Barlow's*, courts decided cases concerning searches of open-air businesses on an ad hoc basis.¹⁸⁰ In cases decided after *Katz* and *Barlow's*, however, the use and nature of the area searched were examined for indicia of a reasonable expectation of privacy.¹⁸¹ Whether or not an area was open to the public was considered an especially important factor.¹⁸² In *Air Pollution Variance Board v. Western Alfalfa Corp.*,¹⁸³ a health inspector entered the defendant's business premises without a warrant to conduct a test of smoke emissions for pollution.¹⁸⁴ In holding the search valid, the Court emphasized that the inspector had seen only that which was visible to the public and that there had been no showing "that he was on premises from which the public was excluded."¹⁸⁵

Second, if businesses cannot be said to have curtilages, then presumably all activities outside their offices—perhaps even those in factory areas—are conducted in open fields, and are thus unprotected from warrantless searches. A per se exception for open fields would thus favor businesses usually conducted indoors over those traditionally conducted outside, unless the latter can somehow enclose themselves. Courts, however, have specifically refused to impose such absurd demands upon outdoor businesses; in *United States v. Allen*,¹⁸⁶ for example, the Court of Appeals for the Ninth Circuit assured the defendant that it was unnecessary for him to construct an opaque bubble over his land to assert a reasonable expectation of privacy.¹⁸⁷

It is possible that open-air areas of businesses would be treated as being within a third category—neither "open fields" nor "curtilage," but perhaps something such as "premises." Designation of a third type of outdoor area for fourth amendment protection has logical appeal, but would require yet another set of bright line rules if the new category were to be treated differently from an open field or a curtilage.

Finally, there are always enterprises which fall into gray areas, no matter how carefully drawn and comprehensive the classifications may be. What, for example,

178. *Id.* at 3201 (quoting *Lanza v. New York*, 370 U.S. 139, 143-44 (1962)).

179. See *supra* notes 24-29 and accompanying text.

180. See, e.g., *United States v. Sorce*, 325 F.2d 84 (7th Cir. 1963), *cert. denied*, 376 U.S. 931 (1964) (warrantless entry into open-air nursery does not violate fourth amendment).

181. See, e.g., *United States v. F.M.C. Corp.*, 428 F. Supp. 615, 618 (W.D.N.Y. 1977) (fenced area used for industrial purposes is protected by fourth amendment because the "highly restricted access" effectively altered the use of the land to bring it within the scope of *Barlow's*).

182. See, e.g., *Patterson v. National Transp. Safety Bd.*, 638 F.2d 144, 146 (10th Cir. 1980) (inspection of airplane, parked in an airport field, which was privately owned and operated but which was open to the public, was valid). The *Katz* Court itself had stated, "What a person knowingly exposes to the public, even in his own . . . office, is not a subject of fourth amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967).

183. 416 U.S. 861 (1974).

184. *Id.* at 862-63.

185. *Id.* at 865.

186. 675 F.2d 1373 (9th Cir. 1980).

187. *Id.* at 1380. See also *Burkholder v. Superior Court*, 96 Cal. App. 3d 421, 429, 158 Cal. Rptr. 86, 91 (1979) (citadel-like fortification is unnecessary).

would be the rules for a semi-indoor business, such as a plant nursery or dairy? If the rules for homes and businesses are different, what would be the standard for family farms or boarding houses?¹⁸⁸

E. Inconsistency with Overall Fourth Amendment Analysis as Set Forth in Katz

As a per se exception, the open fields rule is an irrebuttable presumption that an individual can have no reasonable expectation of privacy in certain areas. This presumption turns solely on the nature of the area itself. The rule is thus inconsistent with the basis of *Katz*: an individual is protected by the fourth amendment irrespective of the nature of the location of his or her activities, as long as he or she has a reasonable expectation of privacy there.¹⁸⁹

The Court in *Katz* specifically stated that "[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures."¹⁹⁰ Subsequently, both the United States Supreme Court and lower federal and state courts have held that *Katz* applied beyond one's own property; for example, it applies to searches of citizens on a street,¹⁹¹ luggage,¹⁹² and even searches conducted in public rest rooms.¹⁹³ In *Katz* itself, the area in question was a public telephone booth.

Since the *Oliver* decision did not overrule *Katz* or limit it beyond the affirmation of the open fields doctrine as a per se exception, the curious result is that one may be more successful in asserting fourth amendment protection when off one's own private property than when on it. For example, if *A* were camping out in a public area, he could presumably insist upon a *Katz* reasonable expectation of privacy analysis of any warrantless search of his possessions lying on the ground. By contrast, if *B* chose to set up an identical campsite on her own land, but beyond her "curtilage," she would be barred under *Oliver* from trying to show that a similar search violated her reasonable expectation of privacy, unless she could persuade the court that her campsite should be seen as a temporary residence with a curtilage of its own. There may indeed be very little likelihood that either *A* or *B* would be able to convince the trier of fact that he or she did in fact have a reasonable expectation of privacy at all, in which case even under a full *Katz* analysis either search would be valid. Still, *A* would have the opportunity to make the argument—solely by virtue of the fact that he was *not* on his own land. It seems peculiar that such an important argument would have been available to *B* had the search been in *Katz*'s phone booth, but not if it took place in her own "back forty."

188. See *Rodriguez v. State*, 468 So.2d 312 (Fla. Dist. Ct. App. 1985) (barn was not a "curtilage" area when used only "incidentally" for shelter).

189. See *supra* notes 35-37 and accompanying text.

190. *Katz v. United States*, 389 U.S. 347, 359 (1967).

191. *Terry v. Ohio*, 392 U.S. 1 (1968).

192. *United States v. Rengifo-Castro*, 620 F.2d 230 (10th Cir. 1980).

193. *State v. Bryant*, 287 Minn. 205, 177 N.W.2d 800 (1970).

V. POSSIBLE APPROACHES TO THE OPEN FIELDS DOCTRINE AFTER *Oliver*

The most obvious post-*Oliver* approach to the open fields doctrine is to take the *Oliver* majority opinion at face value and apply the doctrine as a complete per se exception to the warrant requirement—a strict bright line rule. In order for the open fields doctrine to be effective as a bright line, however, several matters would have to be clarified for courts. For example, are open fields still all areas beyond a building's curtilage? How far does a curtilage extend? What is the effect of the use of the area? Are outbuildings part of the curtilage? Have commercial buildings curtilages? Are rules for businesses different than for homes? If so, what are they? What happens when a dwelling and a business are combined, as in a family farm?

These questions are, of course, the very sort which plagued courts prior to *Katz*, and which led the Supreme Court to abandon the *Olmstead* locational analysis in favor of the reasonable expectation of privacy test.¹⁹⁴ If *Oliver* has merely reopened the Pandora's box of pre-*Katz* analysis of searches of outdoor areas, then the open fields doctrine is useless as a bright line rule without dozens—or perhaps hundreds—of supplementary bright line rules answering the above and many related questions. One post-*Oliver* approach, then, is to view the open fields doctrine as a bright line in the strictest sense, as the *Oliver* opinion seems to suggest—but to supplement it with what can quickly add up to “an unmanageable multiplicity of rules—more bright lines than the human eye can keep in view.”¹⁹⁵

At the other extreme is eliminating the open fields doctrine as a bright line rule altogether, and applying the *Katz* analysis directly to searches of open fields as for all other areas. Since *Oliver* rejected this possibility, however, it does not seem to be a viable option for the present, at least under the fourth amendment.¹⁹⁶

State courts, however, may avoid the effects of *Oliver* by interpreting their state constitutions as extending protection to open fields.¹⁹⁷ Several state courts have engaged in this inquiry since *Oliver* was decided. In *State v. Crandall*¹⁹⁸ for example, a Washington court of appeals, following *Oliver*, acknowledged that open fields are not protected by the fourth amendment and found that the area searched in that case, “800 feet [from] the nearest residence or outbuilding,” was open fields, not curtilage.¹⁹⁹ The court went on to note, however, that

194. See *supra* notes 34–49 and accompanying text. Even the *Katz* test, of course, was no panacea. See *supra* notes 62–65 and accompanying text.

195. Alschuler, *supra* note 101, at 231.

196. But see *Blalock v. State*, 476 N.E.2d 901 (Ind. Ct. App. 1985). (*Katz* test applied to aerial surveillance of greenhouse in secluded rural area).

197. A state's courts are always free to look to the state constitution for additional protections. See, e.g., *Oregon v. Mathiason*, 429 U.S. 492, 499 (1977) (Marshall, J., dissenting); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (Marshall, J., dissenting); *Baxter v. Parmigiano*, 425 U.S. 308, 338–39 (1976) (Brennan, J., dissenting); *Michigan v. Mosley*, 423 U.S. 96, 120–21 (1975) (Brennan, J., dissenting); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 Ky. L.J. 421 (1974); Wilkes, *More on the New Federalism in Criminal Procedure*, 63 Ky. L.J. 873 (1975).

198. 39 Wash. App. 849, 697 P.2d 250 (1985). See also *State v. Havlat*, 217 Neb. 791, 351 N.W.2d 86 (1984); *State v. Getter*, No. 8759 (Ohio Ct. App. Mar. 14, 1985).

199. *State v. Crandall*, 39 Wash. App. 849, 851, 697 P.2d 250, 252 (1985).

[t]he Washington Constitution, Const. art. 1, § 7, differs significantly from the fourth amendment to the United States Constitution in providing: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Because of its unique language, Const. art. 1, § 7 generally provides greater protection than does the fourth amendment to the United States Constitution.

Therefore, though the specific language of the [f]ourth [a]mendment may not embrace open fields as stated in *Oliver* . . . that does not foreclose an inquiry under the Washington Constitution to determine whether the State has unreasonably intruded into the defendant's "private affairs." The analysis is not confined to the subjective privacy expectations of citizens who are learning to expect diminished privacy, but rather, "it focuses on those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant."²⁰⁰

The court stressed that neither the open fields doctrine nor the *Katz* test is dispositive of a violation of the Washington Constitution; instead, "each serves as a factor in determining whether the entry onto the property unconstitutionally intruded into a person's 'private affairs.'"²⁰¹ Although the search in *Crandall* was ultimately found not to have violated the Washington Constitution, the court stressed that its decision rested on the particular facts of that case.²⁰²

Eliminating the open fields doctrine as a bright line rule need not, however, entirely preclude the doctrine's use. Unalterable, "prophylactic"²⁰³ rules are not the only possible effective expression of even the most clearly valid doctrines. Instead, judicial rules generally tend to be "presumptive"²⁰⁴ rules, which are modified or set aside in exceptional circumstances.²⁰⁵ Despite this somewhat tentative character of most judicial rules, they can nevertheless provide significant guidance to police.²⁰⁶ Characterization of the area searched as an open field could be used as evidence to raise an inference, or even a strong but rebuttable presumption, that the defendant did not have a reasonable expectation of privacy.²⁰⁷ The burden of production of evidence, and perhaps the burden of persuasion as well, could then be shifted to the defendant to demonstrate, by factors such as remoteness of the area from public view, inaccessibility, posting of signs or erection of fences, that he or she did in fact have a reasonable expectation of privacy under the *Katz* test.

This approach would prevent the working of injustice in the unusual case for the sake of efficiency in frequent ones.²⁰⁸ An analysis of this kind was advocated in

200. *Id.* at 853, 253.

201. *Id.* at 854, 253.

202. *Id.* See also *State v. Myrick*, 102 Wash. 2d 506, 688 P.2d 151 (1984) ("[T]he unique language of Const. art. 1, §7 provides greater protection to persons under the Washington Constitution than U.S. Const. amend. 4 provides to persons generally.").

203. Alschuler, *supra* note 98, at 235.

204. *Id.* at 235-36.

205. *Id.* at 237.

206. *Id.* at 236.

207. The same evidence could often be used to show that the search fell within the plain view exception. See *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 417 U.S. 71 (1974).

208. See *supra* notes 106-10 and accompanying text.

Florida v. Brady,²⁰⁹ a case factually similar to *Oliver*. The *Brady* opinion stressed: "We are not here sounding the death knell for the open fields doctrine—only for the blind, indiscriminate application thereof."²¹⁰

It is important to note that adopting this approach (or any other that possibly brings open fields within fourth amendment protection) would not prevent the state from conducting searches of these areas and obtaining crucial evidence. Rather, police officers would simply be required to obtain a warrant prior to conducting the search. Since the standard for establishing probable cause is relatively low, it is possible that the information currently leading to warrantless searches would suffice to meet this standard.²¹¹ For example, in cases like *Oliver*, aerial surveillance²¹² could readily be employed to get the needed information. Other open fields cases may fall within the plain view exception.²¹³ The impediment to efficient law enforcement thus would be minimal.²¹⁴

Just because its per se application is a flaw of the *Oliver* rule does not mean that no bright line rule could be a workable solution. A fourth possibility, employing a different bright line rule, was suggested by the dissent in *Oliver*. To satisfy both the need for a "clear, easily administrable rule"²¹⁵ and the need to protect the right of "men and women, in civilized society, . . . 'to be let alone' by their governments,"²¹⁶ a bright line rule based on state criminal trespass law would be preferable to a per se exception of open fields. The Court's rejection of the trespass doctrine as a boundary at one end of the spectrum (if there is no trespass, no warrant is required) does not necessarily imply acceptance of the converse (a trespass requires a warrant). As stated by Justice Marshall, the proposed rule would be simply that "private land marked in a fashion sufficient to render entry thereon a criminal trespass under the law of the state in which the land lies is protected by the Fourth Amendment's proscription of unreasonable searches and seizures."²¹⁷

Under the majority's approach, claimed the dissent, police officers "will be obliged in the future to make on-the-spot judgments as to how far the curtilage extends, and to stay outside of that zone,"²¹⁸ a process in which errors will be likely because of the lack of a clear definition of "curtilage."²¹⁹ By contrast, the criminal trespass bright line rule would be easily applied by police, since

209. 406 So. 2d 1093 (Fla. 1981), *cert. granted*, 456 U.S. 988 (1982), *cert. dismissed*, 104 S. Ct. 2380 (1984) (remanded for disposition in light of *Oliver*).

210. *Id.* at 1098.

211. Note, *supra* note 7, at 940-41.

212. See *supra* notes 104-05 and accompanying text.

213. Courts have often found that no search under the fourth amendment has been conducted when an unintruding officer has observed matters which the subject of the search had failed to protect from observation. Seizure of items thus observed therefore is reasonable under the fourth amendment irrespective of the existence or availability of a warrant. C. McCORMICK, McCORMICK ON EVIDENCE §§ 169, 171 (3d ed. 1984).

214. Note, *supra* note 7, at 941. Nor could such inconvenience by itself justify a warrantless intrusion. See *supra* notes 106-10 and accompanying text.

215. *Oliver v. United States*, 104 S. Ct. 1735, 1750 (1984) (Marshall, J., dissenting).

216. *Id.* at 1751 (quoting *Olmstead v. United States*, 227 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

217. *Id.* at 1750.

218. *Id.*

219. *Id.* at 1751 n.20.

it draws upon a doctrine already familiar to both citizens and government officials. In each jurisdiction, a substantial body of statutory and case law defines the precautions a landowner must take in order to avail himself of the sanctions of the criminal law. The police know that body of law, because they are entrusted with responsibility for enforcing it against the public; it therefore would not be difficult for the police to abide by it themselves.²²⁰

In addition, the fourth amendment goal of protecting property interests²²¹ is served better by the criminal trespass rule than by the open fields rule. Moreover, the property right to exclude the public, according to the Court, creates a legitimate expectation of privacy: property rights "reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, [and so] should be considered in determining whether an individual's expectations of privacy are reasonable."²²² The criminal trespass rule therefore would be a bright line more responsive to actual societal norms—and thus more compatible with *Katz*—than the per se exception of open fields from the protection of the warrant requirement.²²³

Moreover, the dissent pointed out that "by exempting from the coverage of the Fourth Amendment large areas of private land, the Court opens the way to investigative activities we would all find repugnant."²²⁴ The criminal trespass rule, on the other hand, would avoid the erosion of respect for trespass law generally by preserving the powerful example of the government's own respect for laws which protect individual privacy.²²⁵

Finally, a variation on the *Oliver* dissent's "criminal trespass" rule has been suggested.²²⁶ This approach combines the trespass rule with a *Katz* reasonable expectation of privacy test. Thus, a minimum level of protection is established by the trespass rule, with the *Katz* test expanding protection to situations in which there has been no actual physical trespass by an officer, but where an individual's reasonable expectation of privacy has nevertheless been violated.²²⁷ This analysis would clearly be the most expansive approach to the open fields problem. However, used in conjunction with the plain view exception and other established exceptions to the warrant requirement, it should not frustrate law enforcement objectives to any greater extent than any of the more restrictive approaches, including the per se exception adopted as a bright line rule by the *Oliver* majority.

VI. CONCLUSION

Despite the general rejection of locational tests for fourth amendment analysis in favor of the case-by-case *Katz* reasonable expectation of privacy test, the United

220. *Id.* at 1750.

221. *See supra* note 155 and accompanying text.

222. *Rakas v. Illinois*, 439 U.S. 128, 153 (1978) (Powell, J., concurring).

223. The criminal trespass rule would also dovetail with the "open to the public" exception.

224. *Oliver v. United States*, 104 S. Ct. 1735, 1751 (1984); *see also supra* note 99.

225. *See supra* notes 97-99 and accompanying text.

226. Comment, *The Relationship Between Trespass and Fourth Amendment Protection After Katz v. United States*, 38 OHIO ST. L.J. 709 (1977).

227. *Id.* at 710.

States Supreme Court has declared in *Oliver v. United States* that *Katz* did not eliminate the open fields doctrine. The Court's reasoning in support of its position is weak, and the resulting rule is flawed.

As a per se locational exception, the open fields doctrine is irreconcilable with *Katz*, a decision which rests in part upon societal expectations which vary over time and place. The Court's presumption that society would never recognize as reasonable any privacy interest asserted for open fields is a vast overgeneralization, to say the least—yet it is upon the basis of this presumption that the Court reconciles *Oliver* with *Katz*.

Oliver raises several questions regarding searches of outdoor and semi-outdoor businesses. If nonresidential buildings cannot be said to have curtilages for fourth amendment purposes, it would appear that businesses' outdoor activities are not protected by the fourth amendment as construed in *Marshall v. Barlow's*, and therefore businesses conducted indoors would be favored. On the other hand, if nonresidential buildings do have curtilages, some definition of curtilage not turning upon domestic use and proximity to living quarters must be developed. To designate outdoor business areas as a third category, neither "open fields" nor "curtilage," would require promulgation of a new set of rules to supplement the open fields doctrine. Semi-indoor businesses and areas used for both domestic and business purposes raise additional problems of classification.

If a bright line rule is needed for searches of open fields, a rule based on state criminal trespass law, as suggested by the *Oliver* dissent, would be preferable to a per se exception. Officers preparing to conduct a search would, under this approach, make a determination based on clear and familiar guidelines of trespass law, rather than on judgments estimating the existence and extent of a curtilage. A trespass-based rule would be responsive to societal expectations of privacy based on property rights, and would prevent erosion of respect for trespass law through government example. Perhaps the most workable and realistic solution would be a combination: the trespass-based rule suggested by the *Oliver* dissent used in conjunction with a *Katz* analysis for situations in which there has been no actual physical trespass by an officer.

The extent to which courts can avoid the problems inherent in a per se rule for open fields is limited by the *Oliver* opinion's strict interpretation of the open fields doctrine. However, if lower courts continually find themselves struggling with application of the rule, and if its efficiency objectives are not clearly served, the United States Supreme Court ultimately may become more receptive to a modified interpretation that would provide for exceptions in appropriate cases.

Susan Gellman

